Supreme Court, U.S.
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No. 01-244 AUG 8 - 2001

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

MARIA DEL CARMEN MIRANDA
DE VILLALBA,

Petitioner.

vs.

COUTTS & CO. (USA) INTERNATIONAL,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The United States Court of Appeals for the Eleventh Circuit has held, in conflict with decisions of the Ninth and Tenth Circuit Courts of Appeals, that the Right to Financial Privacy Act permits a financial institution to voluntary disclosure all of an account holder's protected financial information concerning a wire transfer save for the "details of the purported recipient of the funds requested to be wired". This holding raises this substantial federal question that warrants immediate review by this Court:

Whether the scope of the "nature of the suspected illegal activity" permitted by the Right to Financial Privacy Act encompasses all information concerning a wire transfer save for the information concerning the recipient of the wire transfer?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Maria Del Carmen Miranda De Villalba, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on May 11, 2001.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida is reprinted in the appendix hereto, *Appendix-2, infra*. The opinion of the Court of Appeals for the Eleventh Circuit is reprinted in the appendix hereto, *Appendix-37, infra*.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on May 11, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

12 U.S.C. §3403(c), provides in pertinent part:

> Nothing in this chapter shall preclude any financial institution, or any officer, employee or agent of a financial institution, from notifying a Government authority that such institution, or officer, employee, or agent has information which may be relevant to a possible violation of any statute or regulation. **Such information may include only the name or other identifying information concerning any individual, corporation, or account involved in and the nature of any suspected illegal activity.** . . . Any financial institution, or officer, employee, or agent thereof, making a disclosure of information pursuant to this subsection, shall not be liable to the customer under any [federal or state law]. (emphasis added)

STATEMENT OF THE CASE

In May 1996, the United States filed an in rem complaint against $200,000 in accounts at Respondent and other financial institutions. The accounts at Respondent were controlled by Petitioner and her relatives. The Government's complaint alleged that the funds in the accounts were obtained from money laundering. The District Court for the Southern District of New

York immediately issued a civil arrest warrant for the funds, and the warrant was faxed to Respondent. The warrant ordered Respondent to "arrest, attach and seize the Property until further order of the Court."

A day or two after these warrants were executed, according to a deposition of the Assistant U.S. Attorney ("AUSA") handling the forfeiture action, "someone" at Respondent told the AUSA that Petitioner had unsuccessfully attempted to wire transfer money out of her account at Respondent; the AUSA "believe[d] the number given was $500,000."

In July 1996, Petitioner and several of her relatives filed this civil action in the Southern District of Florida, alleging that Respondent's disclosure of the attempted $500,000 withdrawal violated the RFPA, and other laws. After dismissal of the original complaint and reinstatement following a prior appeal to the Eleventh Circuit, *See: Villalba v. Coutts & Co. (USA)*, 156 F.3d 185 (11th Cir. 1998), the complaint was narrowed to include only

a claim by Petitioner against Respondent under the RFPA.

Respondent sought summary judgment on the ground that even if the alleged disclosure of an attempted $500,000 wire transfer had occurred, Respondent is protected from liability by 12 U.S.C. §3403(c).

REASONS FOR GRANTING THE WRIT

This Court's review of the Eleventh Circuit's decision is warranted because the Eleventh Circuit "decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals," Sup. Ct. R. 10(b).

The question, simply put, is what is the scope of disclosure permitted by §3403(c)'s "the nature of any suspected illegal activity"? The Eleventh Circuit has held in the wire transfer context that the scope includes all account information save for the information concerning the recipient of the wire transfer, thereby stretching the scope of the disclosure beyond Congressional mandate and the decisions of the Ninth and Tenth Circuit Courts of Appeals.

I. The Eleventh Circuit Holding

In affirming the District Court's granting of summary judgment, the Eleventh Circuit held:

> The further issue on the merits is whether the extent of the alleged disclosure exceeded the scope of the information section 3403(c) permits to be revealed. Even if we assume, as Villalba contends, that disclosure is limited to the name of the individual and "the nature of any suspected illegal activity," 12 U.S.C. §3403(c) (emphasis added), we agree with the District Court that the alleged mention of the $500,000 amount of the requested wire transfer did not go beyond the "nature" of the suspected activity. What made the request indisputably suspicious was its size, and we would be trifling with the statute if we construed it to permit disclosure of request to transfer "a very large amount," but not "a $500,000 amount." *See Bailey v. USDA*, 59 F.3d 141, 143 (10th Cir. 1995) (disclosure of withdrawal and deposit records can qualify as information about "nature of the suspected illegal activity," where these amounts are necessary to show grounds for the bank's suspicion). **The congressional concern for privacy was sufficiently observed by not revealing any details of the purported recipient of the funds requested to be wired**. (*Appendix-44*, emphasis added).

By this decision, the Eleventh Circuit has abandoned the

limitations on disclosure that Congress explicitly placed and created a conflict with the Ninth and Tenth Circuit Court of Appeals. In particular, the Eleventh Circuit ruled that a §3403(c) "nature of any suspected illegal activity" disclosure may include the exact financial information relating to a wire transfer including the date and amount of such transfer. Such a holding does great violence to the protections crafted in §3403(c).

II. Congress Clearly Limited the Scope of Disclosure

As originally enacted, §3403(c) permitted a bank to make a voluntary disclosure of otherwise protected information. When enacted in 1978, §3403(c) stated:

> **Notification to Government authority of existence of relevant information in records.** Nothing in this title shall preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying a Government authority that such institution, or officer, employee, or agent has information which may be relevant to a possible violation of any statute or regulation.

Thereafter, concerns were raised by banking industry and law enforcement officials that the language of §3403(c) as originally

enacted was insufficiently specific to insure immunity to the banks if they did "tip" law enforcement. *See*: *Drug Money Seizure Act and the Bank Secrecy Act Amendments*, hearing before the Senate Banking, Housing and Urban Affairs Committee, May 1, 1986, 99-692, pp.74-91.

As a result, Public Law 99-570 was signed into effect on November 3, 1986. Section 1353(a) of P.L. 99-570 amended §3403(c) by adding the following italicized and emphasized language to that section:

> **Notification to Government authority of existence of relevant information in records.** Nothing in this title shall preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying a Government authority that such institution, or officer, employee, or agent has information which may be relevant to a possible violation of any statute or regulation. *Such information may include only the name or other identifying information concerning any individual, corporation or account involved in and* ***the nature of any suspected illegal activity.*** *Such information may be disclosed notwithstanding any constitution, law, or regulation of any State or political subdivision thereof to the contrary.*

Accordingly, from the plain language of the amendment, a bank may voluntarily disclose two items: (i) customer financial information related to identification and (ii) "the nature of any suspected illegal activity". Plainly what is required by (ii) is a description of the illegal activity suspected by the bank – not a description of the account activity.

Indeed, that was the legislative intent of the 1986 amendment. In the House Judiciary Committee report on the 1986 amendment of §3403(c), the Committee stated:

> This subsection amends the Right to Financial Privacy Act provision (section 1103(c), 12 U.S.C. §3403(c)) that now permits financial institutions to notify law enforcement agencies of suspected violations of law to clarify that the notification may include the furnishing of details **(including name, account number, and description of possible violation)** sufficient to enable such Government authority to obtain access to or copies of such information pursuant to law. (emphasis added).

House Judiciary Report, 99-855, p. 20. Likewise, the House Banking, Finance and Urban Affairs report noted that

"specifically, [the amendment to §3403(c)] would permit an institution to provide to such officials the names, addresses, account numbers **the nature of and a description of the possible violation. No information provided under this subsection may include the financial records of a customer**." *House Banking, Finance and Urban Affairs Report*, 99-746, pp. 29-30. (emphasis added).

Finally, in the Senate Judiciary Committee's report on §3403(c)'s amendment, the report stated:

> While this provision does not authorize wholesale disclosure of financial records, the financial institution must be able to give the Government authority enough information about the nature of the possible violation and parties involved in order for that authority to proceed with a summons, subpoena or search warrant for additional information. . . . **The nature of the suspected illegal activity that may be disclosed includes a specification of the offense that the financial institution believes is being violated, if known, or a description of the activities giving rise to the bank's suspicions.** (emphasis added).

Senate Judiciary Committee Report, 99-433, p. 15.

In sum, Congress carefully crafted the amendment to precisely limit what information a bank may voluntarily disclose to identification of the account and its holder at issue. Here, Petitioner maintains that the disclosure of the amount of the attempted wire transfer – $500,000 – went beyond the "nature of the suspected illegal activity" which Congress clearly limited to a description of what laws were being violated.

III. The Ninth and Tenth Circuit Court of Appeal Respected Congress' Limitation on Disclosure

In the pre-1986 amendment case of *United States v. Franzin*, 780 F.2d 1461 (9th Cir. 1986), *cert. den.*, 479 U.S. 844 (1986), the banks provided to the FBI information about Franzin's accounts without his knowledge or consent and without a warrant. *Id.* at 1464. In holding that a §3403(c) exception did not apply, the court held, "The banks in this case, however did not merely notify the government that they had potentially incriminating information, they actually provided that information without the requisite authorization." *Id.* at 1464, n.1.

In *Puerta v. United States*, 121 F.3d 1338 (9th Cir. 1997), the plaintiff sued, among others, a bank at which he held an account. The gravamen of his complaint was that the bank revealed "financial records" concerning his account without "certification" under §3403(b) and in excess of the limitations of §3403(c).

The court concluded that "taking the evidence submitted in the summary judgment papers most favorably to Puerta, the bank disclosed the following information to the federal agent: Puerta was suspected of some sort of illegal activity regarding his account at [the bank]; the Spanish passport used to open his account said his name was Antonio Simon Palmer; and the picture on his Spanish passport appeared to be the same as the one the federal agent showed the banker of [Puerta]." *Id.* at 1345.

In finding that these disclosure did **not** exceed the limitations of §3403(c), the court concluded:

> The bank was allowed by 12 U.S.C. §3403(c) to tell the agent "the name or other identifying

> information" of its customer suspected of illegal activity, and the nature of the activity. The evidence is that [the banker] told [the government agent] nothing about the nature of the activity, although the agent could have inferred confirmation of what the sheriff had told him. **The banker did not tell** how much money was in Puerta's account, how much had been in it an any particular time, or **what transactions took place in the account**. (Emphasis added).

Id. at 1345. The court then concluded that "§3403(c) should be read to mean that the bank can disclose certain financial records, but only [those providing] the name or other identifying information' and the 'nature of any suspected illegal activity'. These bits of information, whether in the customer's financial records or not, are all that the bank may disclose without a certificate." *Id.* at 1345.

Contrariwise, the Eleventh Circuit has now authorized just the opposite by permitting disclosure of "what transactions took place in the account" – the attempted $500,000 wire transfer of May 9, 1996.

Finally, in *Bailey* v. *United States Department of*

Agriculture, 59 F.3d 141 (10th Cir. 1995), an employee of Metro National Bank noticed that Bailey, who was authorized to redeem food stamps, was depositing large amounts of coupons in his account and immediately withdrawing a corresponding amount of cash. As this behavior was unlike any of the bank's other customers, the employee became suspicious and contacted the U.S. Department of Agriculture. When an investigator came to the bank, he was told the name of Bailey and the monetary value of the food stamps involved and shown the actual log of the bank's daily food stamp redemptions. Bailey was subsequently arrested and prosecuted for food stamp fraud. *Id.* at 142.

In affirming the summary judgment against Bailey in his subsequent civil suit against the bank under the RFPA, the court held:

> We agree with the district court that information contained in the bank's food stamp log relating the amounts of certain cash withdrawals to contemporaneous coupon deposits could rightfully be disclosed as part of the bank's authority to reveal "the nature of [the] suspected activity" under §3403(c). As the district court

> correctly observed, "the key fact that aroused [the bank]'s suspicion was not the deposits of fairly large sums of food coupons, but that amounts roughly equal to the food coupon deposits were withdrawn almost contemporaneously. Reporting these withdrawals was [revealing only] the essence of the suspected illegal activity in this case."

Id. at 143. Significant under *Bailey* for the triggering of §3403(c) then is that (i) "suspicions" must be raised in the bank in order to trigger the voluntary disclosure permitted by this section and (ii) "essence of the suspected illegal activity" controls the amount of information which can be disclosed.

Here, by doing disclosing the amount of the attempted wire transfer -- $500,000 -- Respondent ran afoul of the prohibition enunciated by the House Banking, Finance and Urban Affairs Committee that "[n]o information provided under this subsection may include the financial records of a customer." *House Banking, Finance and Urban Affairs Report*, 99-746, pp. 29-30 and the holding in *Bailey* as well.

Moreover, the Tenth Circuit in *Anderson v. La Junta*

State Bank, 115 F.3d 756 (10th Cir. 1997) subsequently distinguished its holding in *Bailey*. In *Anderson*, an Air Force investigator met with a vice president at La Junta State Bank and asked him to produced Anderson's bank records. The vice president responded by accessing Anderson's bank records on his computer screen outside the view of the investigator. The vice president then orally reported that (i) there was nothing relevant to the investigation and (ii) that only Anderson's military paycheck was being deposited in the account. *Id.* at 758.

In distinguishing *Bailey*, the court held:

> The district court held that the disclosure in this case was also valid as the bank revealed even less information than had been revealed in *Bailey*. However, the issue here is not how much information was provided, but who initiated the contact. The Bank did not suspect plaintiffs of any wrongdoing. Rather, the government initiated the contact based on suspicions arising from information obtained from sources outside of plaintiffs' bank records. We agree with the district court that had the Bank suspected plaintiffs of wrongdoing and initiated contact with the government investigators, the information disclosed would not have violated the RFPA. However the Bank could not respond to the

> government's inquiry and release information to the government investigators unless the government had properly complied with the procedures set forth in the RFPA. Thus, the Bank violated the RFPA.

Id. at 759. Here, the disclosure containing the exact amount of the attempted wire transfer was not based upon any enunciated suspicion of the bank, but only after contact – as in *Anderson* – by the U.S. Government and thus it exceeded the limitations of §3403(c).

CONCLUSION

Congress defined the scope of disclosure under §3403(c) to exclude the information contained in the financial records save for identification information. The Ninth and Tenth Circuits have respected that definition. Now, the Eleventh Circuit has discarded the intent of Congress and the logical reasoning of the Ninth and Tenth Circuits by expanding the definition of "the nature of any suspected illegal activity" to include not the "nature" of suspected illegal activity but the actual records of Petitioner. Such a holding, doing violence as it does to the carefully crafted Congressional scheme and the Ninth and Tenth Circuit Court of Appeal holdings cannot stand.

As such, the petition for a writ of certiorari must be granted.

Respectfully submitted,

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Contents of Appendix

Opinions Below

Order on Defendant's Motion For Summary Judgment And Plaintiff's Cross-motion For Partial Summary Judgment of the United States District Court, Southern District of Florida, entered on March 27, 2000 ..... *Appendix-2*

Opinion of the United States Court of Appeals for the Eleventh Circuit, entered March 13, 2001 ..... *Appendix-37*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-1971-CIV-GOLD/SIMONTON

MARIA DEL CARMEN MIRANDA
DE VILLALBA,

Plaintiff,

vs.

COUTTS & CO. (USA) INTERNATIONAL,

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE is before the court upon plaintiffs motion for partial summary judgment (DE # 121) and defendant Coutts & Co.'s motion for summary judgment (DE # 93).

I. Factual and Procedural Background

On May 6, 1996, the United States Attorney's office from the Eastern District of New York filed a verified complaint in rem in the United States District Court for the Eastern District of New

York (Civil Action Case No. CV-96-224 1) against $199,710.00 in United States currency allegedly obtained from illegal money laundering. On the same day, after a review of the complaint, Judge David G. Trager issued a civil arrest warrant for certain funds on deposit, or which were attempted to be deposited on or before May 14, 1996, in certain accounts at the three defendant institutions, Coutts & Co. (USA) Int'l ("Coutts & Co."), International Bank of Miami ("IBM"), and NationsBank of Florida ("NationsBank"" (collectively, "the banks").

Upon execution of the warrants, the banks allegedly disclosed to the government agents information regarding the accounts of the persons or entities listed in "Schedule A" attached to the verified complaint, which included specifically plaintiff Maria Del Carmen Miranda De Villalba ("Maria") "and all related individuals and entities." Though not specifically listed in Schedule A, the accounts of plaintiffs Carlos Villalba, M.D. ("Carlos"), Angeles Hidalgo Dc Villalba ("Angeles"), and Menchu, S.A. ("Menchu", were also seized. Allegedly, based on

the warrant and verbal instructions of the government agents, the banks disclosed in-transit communications and stored electronic information, and also froze accounts held in electronic storage.

On May 23, 1996, based on the information obtained from the execution of the May 6 warrant, the United States issued an amended complaint, wherein only three (3) of the 53 allegations named Maria as having received tainted funds. None of the other plaintiffs were mentioned. On June 21, 1996, the New York court issued a judicial subpoena in the in rem action, directing that defendant banks produce "[a]ll documents concerning, referring, or relating to" Maria, including deposits and withdrawals, opening of accounts information, and wire transfer advices and instructions. Details about the accounts of the plaintiffs were revealed as a result of that subpoena.

On July 19, 1996, plaintiffs filed their initial four count complaint in the Southern District of Florida against Coutts &

Co., IBM, and NationsBank.[1] The complaint sought actual damages and punitive damages for alleged willful violations of the provisions of the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. §2510, et seq., the Right to Financial Privacy Act of 1978 ("RFPA"), 12 U.S.C. §3401, et seq., Federal Reserve Board Regulation J, and Florida statutory law. The complaint alleged that these violations arose because the banks disclosed the information in plaintiffs' accounts based only on the verbal orders of government officials and the general in rem May 6 warrant. The banks filed Rule 12(b)(6) motions to dismiss in August of 1996. The district court entered an order dismissing the complaint on September 27, 1996, concluding that plaintiffs failed to state a valid cause of action because the applicable statutes provided "a complete defense" to the plaintiffs' allegations in light

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[1]This case was originally assigned to Judge James Lawrence King. On January 28, 1999, Judge King entered an order of recusal, and the case was reassigned to Judge Shelby Highsmith. Judge Highsmith entered an order of recusal on February 22, 1999, and the case was reassigned to Judge Alan S. Gold.

of the fact that the banks had relied on the May 6 warrant when they made the allegedly unlawful disclosures. The plaintiffs appealed the decision to the United States Court of Appeals for the Eleventh Circuit.

In August of 1998, the Eleventh Circuit affirmed the court's dismissal of the plaintiffs' state law claims, but reversed and remanded the case for further proceedings under the RFPA and the ECPA. Villalba v. Coutts & Co.. 96-5423, slip op. (11th Cir. August 14, 1998) (hereinafter "Slip op."). With respect to plaintiffs' RFPA claims, the Eleventh Circuit held that defendants could not rely on the defenses found at 12 U.S.C. §§3413(d) and 3413(e). Section 3413(e) permits banks to disclose financial records when the records are sought by the Government pursuant to the Federal Rules of Civil or Criminal Procedure in connection with litigation to which the Government and the customer are parties. The Eleventh Circuit held that because the complaint was in rem against the funds and none of the plaintiffs were actually parties to the litigation, §3413(e) does not protect the banks.

Section 3413(d) directs banks to disclose financial records that are required to be reported in accordance with a Federal statute or rule. The banks argued that because the disclosures were made pursuant to a warrant that was authorized by federal law, §3413(d) applies. The Eleventh Circuit disagreed, holding that because the disclosures were not made pursuant to actual legislation,"federal law," but instead pursuant to a warrant, §3413(d) does not apply. The Eleventh Circuit concluded that plaintiffs had established a cause of action under the RFPA.

Since the Eleventh Circuit issued its mandate, much has changed in this case. First, on October 12, 1998, plaintiffs filed a five count Amended Complaint seeking damages for alleged violations of the Electronic Communications Privacy Act (Counts I through IV) and the Right to Financial Privacy Act (Count V). Second, on January 1, 1999, NationsBank was dismissed as a defendant by stipulation of the plaintiffs, and on April 26, 1999, International Bank of Miami was dismissed as a defendant with prejudice from the case by stipulation of the parties. Coutts & Co.

thus remains as the only defendant in this case. Third, plaintiffs dismissed Counts I through IV of their amended complaint after discovery revealed they could not maintain their ECPA claims.[2] Count V the RFPA claim is now the only claim before the court in this action. Fourth, plaintiffs confirmed at oral argument that the remaining RFPA count involves only Maria Villalba, and therefore, the other plaintiff are no longer before the court in this case.[3] The court is therefore left with one plaintiff, Maria Villalba,

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[2] In their memorandum of law in opposition to defendant's motion for summary judgment plaintiffs concede that "[d]iscovery has revealed that Coutts & Co. did not disclose information that was being held in "electronic storage" as that term is defined at 18 U.S.C. §2510(17). Hence, the ECPA is not applicable to the actions of Coutts & Co. Thus, at this stage of the proceedings, Plaintiffs are unable to oppose Coutt's & Co.'s motion for summary judgment on counts I, II, III, and IV of the amended complaint." See P.I. Response at 8-9. The court confirmed with the plaintiffs at oral argument that Counts I through IV are no longer before the court in this case. Therefore, in light of plaintiffs stipulation, the court grants defendant's motion for summary judgment on Counts I, II, III, and IV of plaintiffs amended complaint.

[3]In light of the fact that the other plaintiffs are no longer in this case, the court is not faced with the issue that the Eleventh Circuit faced on appeal of whether the accounts that the

suing one defendant, Coutts & Co., over one claim, a violation of the Right to Financial Privacy Act.

Finally, defendant Coutts & Co. has now filed a motion for summary judgment, and plaintiff Maria Villalba (hereinafter "Maria" or "Villalba" or "plaintiff") has filed a cross-motion for partial summary judgment. The arguments before the court have now changed as well. Plaintiffs claim of a violation of the RFPA arises out of a single incident of an alleged disclosure by the bank to government officials. Where the banks raised §§3413(d) and 3413(e) as defenses before the Eleventh Circuit, defendant now raises 31 U.S.C. §5318(g)(3)[4] and 12 U.S.C. §3403(c) as affirmative defenses. The court also now has a well developed factual record which was not before the Eleventh Circuit. The court heard oral arguments from the parties on March 24, 2000.

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defendant seized were "related to" the accounts of Maria Villalba.

[4]The Eleventh Circuit did discuss the applicability of §5318(g)(3) in its opinion, and the court addresses the Eleventh Circuit's comments on this safe harbor provision in more detail below.

II. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment where the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The court's focus in reviewing a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). The moving party has the burden to establish the absence of a genuine issue as to any material fact. *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Tyson Foods, Inc.*, 121 F.3d at 646. Once the moving party has established the absence of a genuine issue of material fact to which the nonmoving party bears the burden at trial, it is up to the nonmoving party to go beyond

the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Celotex v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed. 2d 265 (1986). Issues of fact are genuine only if a reasonable jury, considering the evidence presented could find for the nonmoving party. *Anderson*, 477 U.S. at 247-51, 106 S.Ct. at 2510- 11. In determining whether to grant summary judgment, the district court must remember that, "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Id. 477 U.S. at 255, 106 S.Ct. at 2513.

III. Violation of the Right to Financial Privacy Act - Count V

A. Introduction

In *United States v. Miller*, 425 U.S. 435,443, 96 S.Ct. 1619, 1623,48 L.Ed.2d 71(1976), the Supreme Court held that individuals have no Fourth Amendment expectation of privacy in their financial records while those records are in the hands of third parties. That decision prompted Congress to enact the Right to

Financial Privacy Act, 12 U.S.C. §3401 et seq., ("the RFPA"). The RFPA protects the secrecy of customers' financial records in banks by limiting federal law enforcement ability to obtain access to the information, as well as a bank's freedom to give it out.[5] The statute prohibits government access to information contained in customers' financial records, unless one of the statutory exceptions in §3402 applies:

§3402. Access to financial records by

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[5] **§ 3403. Confidentiality of financial records**

(a) Release of records by financial institutions prohibited. No financial institution, or officer, employees, or agent of a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this title.

(b) Release of records upon certification of compliance with chapter. A financial institution shall not release the financial records of a customer until the Government authority seeking such records certifies in writing to the financial institution that it has complied with the applicable provisions of this title.

Government authorities prohibited; exceptions

Except as provided by section 3403(c) or (d), 3413, or 3414 of this title, no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and–

(1) such customer has authorized such disclosure in accordance with section 3404 of this title;

(2) such financial records are disclosed in response to an administrative subpena [sic] or summons which meets the requirements of section 3405 of this title;

(3) such financial records are disclosed in response to a search warrant which meets the requirements of section 3406 of this title;

(4) such financial records are disclosed in response to a judicial subpena [sic] which meets the requirements of section 3407 of this title; or

(5) such financial records are disclosed in response to a formal written request which meets the requirements of section 3408 of

this title.

If a government authority asks a bank for access to or copies of information contained in the financial records of a customer, the bank may not release the financial records unless the government agent asking for them provides a written certificate of compliance. The statute lays out a carefully constructed scheme so that the customer generally receives notice of requests for financial information. See 12 U.S.C. §3408- 3410. As long as the bank discloses financial records in good faith reliance on a government certificate of compliance, the statute provides the bank with a defense against a wrongful disclosure suit. See 12 U.S.C. §3417(c). But if the bank responds to a government request by disclosing its customer's financial records without getting a written certificate by the government agent that the government has complied with the provisions of the title, then the bank may be liable to the customer for $100, actual damages, costs, reasonable attorney's fees as determined by the court, and

in some circumstances, punitive damages.[6] 12 U.S.C. §3417(a).

In Count V of plaintiffs amended complaint, the plaintiff alleges that defendant wilfully and intentionally disclosed to federal agents the financial records or information pertaining to the plaintiff in violation of 12 U.S.C. §3417(a). It is not apparent from the complaint exactly what information is alleged to have been disclosed by the defendant, however, in her motion for partial summary judgment, plaintiff identifies a single incident which apparently forms the only basis for her present lawsuit against Coutts & Co. Plaintiff contends that the disclosure was made by Coutts & Co. to the U.S. government on or about May 9, 1996. Coutts & Co. allegedly disclosed that Maria Villalba "sought to transfer $500,000.00 out of her account at Coutts & Co. International (USA)." Pl. Mot. for SJ Concise Statement of Material Facts at ¶1.

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[6] There appears to be no evidence in the record of actual damage to Maria Villalba resulting from the bank's alleged disclosure. At this point, this case may simply be a dispute over $100 and attorney's fees.

B. Disputed Issue Over Whether Coutts & Co. Made a Disclosure

The court must first determine whether there is evidence in the record to support plaintiffs assertion that the disclosure was made.[7] Plaintiff failed to cite to the court exactly what record evidence she is relying on to support her claim. The only piece of record evidence the court could find to support plaintiffs allegation is the deposition of David Goldberg, an Assistant United States Attorney who worked on the case of United States versus $199,710.00. Goldberg states in his deposition that on

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[7]Plaintiff correctly points out that defendant has not disputed in its papers plaintiffs contention that she has established a prima facie case of a violation of the RFPA. Defendant has apparently conceded that Coutts & Co. is a "financial institution" under ° 3401(1); that the alleged disclosure constitutes a "financial record" under §3401(2); that plaintiff Maria Villalba was a "customer" under §3401(5); that it never received "certification" to release the records under §3403(b); and that the disclosure was not made pursuant to any of the enumerated methods under § 3402. See P1. Reply at 4. Defendant also did not challenge the prima facie case during its oral argument. The court concludes that it does appear plaintiff has made a prima facie showing of liability under the RFPA.

May 8th he had a conversation with Pat McCormack of Coutts & Co. *See* Depo at 35. He advised McCormack that they were transmitting a warrant and to be on the lookout for it. *See* id. McCormack talked to Goldberg about scheduling and advised him that she would be out of the office at a certain time. *See* id. at 36. Goldberg added in his deposition that he did not recall if it was McCormack or someone else that he talked to that told him that "a woman by the name of Maria Villalba was seeking to withdraw money, I believe the number given was $500,000, from an account at Coutts & Co., and seeking advice from me about how to proceed". *See* id. Goldberg did not remember who made this comment about Villalba. *See* Id. Goldberg also does not remember if the comment was made on May 8, 1996. *See* id. Goldberg states that he advised the person he spoke with to "act in accordance with that warrant that was being or had been transmitted." See id. at 37.

Additionally, in paragraph 29 of the Third Amended Complaint In Rem filed in the Eastern District of New York

action on May 23, 1996, the government alleges, "[l]aw enforcement officers

learned, on or about May 9, 1996, that Maria Villalba sought to transfer $500,000.00 out of her account at Coutts & Co. International (USA)." Finally, plaintiff apparently also relies on a handwritten note it claims is from a bank officer of Coutts & Co. which states "Long cony. w/ Mr. Goldberg 5/9/96." The note appears to contain instructions and clarifications from the U.S. Attorney such as the fact that interest can continue to accrue in the accounts and that the bank will get a subpoena for information, but the note does not suggest that any information was disclosed. The note only indicates information coming into the bank, and not information going out.

In its reply memorandum, defendant denies that Coutts & Co. made the statement about the attempted transfer, and defendant asserts that the fact is therefore disputed. Def. Reply at 2 & 4. Carlos Solorzano, a vice-president of Coutts & Co., never spoke to anyone from the U.S. government regarding freezing of

the accounts and did not recall Mrs. Villalba attempting to transfer money out of the account after it was frozen. *See* Solorzano Depo. at 5 & 83. Solorzano also did not recall that on May 9, 1996, Villalba attempted to transfer $500,000 out of the account. *See* id. Luis Rodriguez was the corporations manager, security officer, and compliance officer of Coutts & Co. See Rodriguez Depo. at 4-5. Rodriguez states in his deposition that he never learned that Maria Villalba was attempting to transfer $500,000 out of any of the frozen accounts. *See* Id. at 12. Finally, Patricia McCormack states in her deposition of November 6, 1998 that she had no idea how law enforcement officials learned that Villalba tried to wire $500,000 out of her account on May 9. *See* McCormack Depo. at 28~29.[8]

In light of the conflicting evidence in the record on the

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[8] Defendant incorrectly cited to page 29 of McCormack's deposition of "November 18, 1999 [sic]" in its Reply brief. The November 18, 1998 deposition does not contain information relevant to the issue of disclosures on page 29, but the November 6, 1998 does contain the information the court concludes defendant intended to cite.

issue of whether the disclosures were made by Coutts & Co., the court concludes that a disputed issue of fact remains.[9] Defendant, however, contends that summary judgment must still be granted because the disputed issue is rendered immaterial due to the immunity provided defendants by federal statutes.[10]

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[9] The court finds it telling that while defendant made it clear in its reply brief and response in opposition to plaintiffs motion for partial summary judgment that the disclosure issue was in dispute, plaintiff did not address the issue in her reply brief of November 9, 1999. Plaintiff instead attempts to argue that because defendant did not submit a concise statement of material facts which are in dispute, the court should deem everything admitted. The court, however, is interested in resolving this case on the merits. Moreover, neither the plaintiffs nor the defendant's statement of material facts were particularly helpful to the court because they did not contain citations to the record and instead were phrased as conclusory statements. Because defendant's reply brief clearly stated that the disclosure issue was in dispute, the court shall not deem it admitted.

[10] Although the court finds that a disputed issue remains as to whether a disclosure was made, the court notes that the evidence produced by the plaintiff may be legally insufficient for a jury to conclude that a disclosure was actually made. The court could not find, nor has plaintiff suggested, who made the disclosure or when it was made. There also does not appear to be any evidence in the record that Maria Villalba actually attempted to transfer $500,000 out of her account. The court concludes that the insufficiency of plaintiffs evidence may alone be grounds for

C. The Immunity Defense Under 31 U.S.C. §5318(g)(3) - The Annuzio-Wylie Anti-Money Laundering Act ("AWAMLA")

Defendant suggests in its reply that even if it made the disclosure, it is protected by the safe harbor provisions of the Annuzio-Wylie Anti-Money Laundering Act, 31 U.S.C. §5318(g)(3).[11] Section 5318(g)(3) protects defendant when

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granting summary judgment in favor of the defendant. *See James v. Otis Elevator Co.*,.854 F.2d 429, 432 n.3 (11th Cir. 1988) ("Thus to decide the case in James' favor, the jury would have to "flip a coin." A fact that can only be decided by a coin toss has not been proven by a preponderance of the evidence, and cannot be submitted to the jury.").

[11]**§5318. Compliance, exemptions, and summons authority**

(g) Reporting of suspicious transactions.--

(1) In general.--The Secretary may require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation.

(2) Notification prohibited.--A financial institution, and a director, officer, employee, or agent of any financial institution, who voluntarily reports a suspicious transaction, or that reports a suspicious

making "a disclosure of any possible violation of law or regulation . . . pursuant to . . . any other authority. . . ." The "other authority" in this case is presumably the warrant, because defendant never claims that it received oral instructions from the government to disclose additional information. The warrant, however, only commanded the Marshalls "to attach and seize" the property of the plaintiffs and the bank to "arrest all funds".

In *Lopez v. First Union National Bank*, 129 F.3d 1186,

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transaction pursuant to this section or any other authority, may not notify any person involved in the transaction that the transaction has been reported.

(3) Liability for disclosures.--Any financial institution that makes a disclosure of any possible violation of law or regulation or a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution, shall not be liable to any person under any law or regulation of the United States or any constitution, law, or regulation of any State or political subdivision thereof, for such disclosure or for any failure to notify the person involved in the transaction or any other person of such disclosure.

1194(11th Cir. 1997), the Eleventh Circuit did hold that a bank is immunized from liability under the RFPA if the disclosures were made in response to a seizure warrant. However, as the Eleventh Circuit noted in its opinion reversing the dismissal of the RFPA claim in this case, any disclosures made outside the scope of the warrant do not entitle the banks to safe harbor protections. *See Villalba v. Coutts & Co.*, 965423, slip op. at 10 n.5 (11th Cir. August 14, 1998) ("[W]e agree with the banks that they are entitled to any disclosures made pursuant to the warrant. The banks, however, also allegedly made disclosures outside the scope of the warrant. We conclude that such disclosures are not entitled to protection under the third safe harbor of *Lopez*."). While the warrant in Lopez gave the government access to the plaintiffs financial records, the warrant in this case did not. The court concludes that because the alleged disclosure was beyond the scope of the seizure warrant, the defendant is not entitled to protection under the safe harbor provision of § 5318(g).

D. The Immunity Defense Under 12 U.S.C.

§3403(c)

Defendant also contends that even if it made the disclosure it is immune from liability under 12 U.S.C. §3403(c).[12] Under §3403(c), a financial institution possessing information relevant to a possible violation of law

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[12]**§ 3403. Confidentiality of financial records**

(c) Notification to Government authority of existence of relevant information in records

Nothing in this chapter shall preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying a Government authority that such institution, or officer, employee, or agent has information which may be relevant to a possible violation of any statute or regulation. Such information may include only the name or other identifying information concerning any individual, corporation, or account involved in and the nature of any suspected illegal activity. Such information may be disclosed notwithstanding any constitution, law, or regulation of any State or political subdivision thereof to the contrary. Any financial institution, or officer, employee, or agent thereof, making a disclosure of information pursuant to this subsection, shall not be liable to the customer under any law or regulation of the United States or any constitution, law, or regulation of any State or political subdivision thereof, for such disclosure or for any failure to notify the customer of such disclosure.

involving one of its accounts is permitted to make a disclosure of that information to law enforcement. However, the disclosure permitted is limited to the name of the account holder and "the nature of any suspected illegal activity." 12 U.S.C. §3403(c). Plaintiff argues in opposition: 1) defendant cannot raise the defense of §3403(c) because it did not raise it in its affirmative defenses, 2) the defense is inconsistent with defendant's position that it did not disclose any information and 3) the disclosure went beyond what is allowed by §3403(c).

1. Defendant Has Not Waived Its §3403(c) Defense

Plaintiff is correct that defendant failed to raise §3403(c) as an affirmative defense in its answer to plaintiffs amended complaint. "[T]he general rule is that, when a party fails to raise an affirmative defense in the pleadings, that party waives its right to raise the issue at trial." *Hassan v. United States Postal Service*, 842 F. 2d 260, 263 (11th Cir. 1988) (citing *American National Bank v. Federal Deposit Insurance Corp.*, 710 F.2d 1528, 1537

(11th Cir.1983)). However, the liberal pleading rules established by the Federal Rules of Civil Procedure apply to the pleading of affirmative defenses. See id. (We must avoid hypertechnicality in pleading requirements and focus, instead, on enforcing the actual purpose of the rule.").

The purpose of Rule 8(c) is simply to guarantee that the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350,91 S.Ct. 1434, 1453, 28 L.Ed.2d 788 (1971). When a plaintiff has notice that an affirmative defense will be raised at trial, the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice. See *Hassan*, 842 F.2d at 263. When the failure to raise an affirmative defense does not prejudice the plaintiff, it is not error for the trial court to hear evidence on the issue. See id. (citing *Bull's Corner Restaurant v. Director of the Federal Emergency Management Agency*, 759 F.2d 500, 502 (5th Cir.1985)); see also *Jones v. Miles*, 656 F.2d

103, 107 n.7 (5th Cir. Unit B 1981) ("Failure to affirmatively plead the defense is simply noncompliance with a technicality and does not constitute a waiver where there is no claim of surprise.") (dicta) (citation omitted).

Plaintiff claims that allowing the affirmative defense places "an unfair burden" on her, because she has conducted discovery based on defendant's contention that it did not make the disclosures. The court concludes, however, that plaintiff is not prejudiced by allowing defendant to raise this defense. In its seventh affirmative defense, defendant raises the immunity defense under 31 U.S.C. §5318(g)(3). As discussed earlier, this defense is premised on a theory that even if defendant made a disclosure, it is protected by the safe harbor provision. Accordingly, plaintiff was on notice after receiving defendant's answer that while defendant claimed it made no disclosure, defendant also claimed that in the event it did, the disclosure was protected by statute.

Moreover, the language of §5318(g)(3) is quite similar to

the language in 12 U.S.C. §3403(c), and the application of the immunity defense in each statute is also similar. See *Velasquez Campuzano v. Marfa National Bank*, 896 F. Supp. 1415 (W.D. Texas 1995). Both statutes grant immunity from liability should a defendant disclose a "possible violation of law or regulation" of an account holder. The main difference between § 5318(g)(3) and § 3403(c) is that § 5318(g)(3) protects the bank when it makes a mandatory disclosure pursuant to a legal authority, and §3403(c) protects a bank when it makes a voluntary limited disclosure. Plaintiff has failed to show how the discovery implications are significantly different for §5318(g)(3) and §3403(c) because they both involve a departure of defendant's core position that it did not make a disclosure. Finally, it does appear plaintiff conducted discovery covering these issues because she asked defendant's security officer, Luis Rodriguez, whether he filed a "suspicious activity report." The court concludes that plaintiffs have failed to show prejudice and the court therefore allows the defendant to raise §3403(c) as an affirmative defense.

2. Defendant Can Have It Both Ways

Plaintiff also argues that defendant "cannot invoke the protections of the §3403(c) if it maintains that it never made a disclosure in the first instance." Pl. Reply at 6. In support of her position, plaintiff cites to the deposition of Luis Rodriguez, the Bank Secrecy Act compliance officer of Coutts & Co., who testified that he never filed a suspicious activity report with respect to plaintiffs accounts. Plaintiff argues that the testimony proves that the disclosure was not made due to defendant's belief that the attempted wire transfer was a "possible violation of law or regulation," because if it was, they would have been required to file a "suspicious activity report." Plaintiff does not show the court what law, rule, or regulation would have required defendant to file a "suspicious activity report" if it wanted to take advantage of the immunity under ° 3403(c).

Suspicious activity reports are only required to be filed by national banks when federal laws compel disclosure. See *Velasquez-Campuzano*, 896 F. Supp. at 1420-23; 12 U.S.C.

§27(b)(2); 31 U.S.C. § 5318(a)(2); 12 C.F.R. § 21.11; see generally Matthew R. Hall, *An Emerging Duty to Report Criminal Conduct: Banks, Money Laundering, and the Suspicious Activity Report*, 84 Ky. L.J. 643 (1996). In the case where the bank is mandated by federal law to make a disclosure and file a suspicious activity report, the bank would be completely immune from liability under §3413(d). *See* id. Indeed, as the Eleventh Circuit noted in this case, "suspicious activity reports" are only required in to be filed by a bank in the face of "known or suspected crimes involving national banks." Slip op. at 6-7; see also 12 C.F.R. §21.11. In *Velasquez-Campuzano*, the plaintiffs were specifically accused of violating 31 U.S.C. §5324(a)(3) - structuring a transaction to evade a reporting requirement. *Velasquez-Campuzano*, 896 F. Supp. at 1420. The Code of Federal Regulations at 12 C.F.R.§ 21.1 1(b)(4) obligated the bank to report the transaction. *Id.* at 1420 n.5. Had the bank failed to file the report, it would have been subject to civil money penalties. *Velasquez-Catnpuzano*, 896

F. Supp. at 1421 (citing 12 C.F.R. 21.11(i)).

In this case, the parties have never argued that the defendant had a duty to report plaintiffs transaction pursuant to any federal law or that the bank was subject to civil penalties for failing to file a suspicious activity report. Because no federal law was involved, the Eleventh Circuit rightly found in this case that the bank was not entitled to the §3413(d) defense. Suspicious activity reports are not required when a bank makes a voluntary disclosure under §3403(c). See, e.g., *Puerta v. United States*, 121 F.3d 1338 (9th Cir. 1997) (bank granted immunity under §3403(c) and no suspicious activity report was filed); *Bailey v. United States Dep't. of Agriculture*, 59 F.3d 141 (10th Cir. 1995) (same). The court therefore concludes that if a disclosure was made, the fact that no suspicious activity report was filed is entirely consistent with voluntary reporting under §3403(c), and Coutts & Co. is entitled to assert this affirmative defense.

3. Defendant is Entitled to Immunity Under §3403(c)

The court concludes that if defendant made the disclosure, the defendant cannot be held liable for it under the protections in ° 3403(c). Regardless of the underlying validity of the warrant,[13] it is undisputed that at the time the alleged disclosure was made, the bank had before it the warrant for

arrest in rem which specifically named Maria Villalba, alleged violations of money laundering laws and controlled substances laws, and indicated that the money was subject to civil forfeiture. If the bank did make a disclosure, the only reasonable conclusion is that it did so because it suspected the plaintiff was attempting to commit further crimes related to those listed on the face of the

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[13] Although plaintiff makes arguments that the underlying warrant in this case was invalid for various reasons not due to any fault on the part of the bank, the court concludes that the actual validity of the warrant is irrelevant to any of the claims before the court. What is relevant is the fact that it is undisputed that the bank had a copy of the warrant by the time the alleged disclosures were made in this case. There is also no evidence that the bank made the disclosure in bad faith.

warrant.[14] In light of the information the bank had before it, the attempt to transfer $500,000 out of an account frozen pursuant to a warrant is objectively suspicious and no reasonable jury could find otherwise. It also does not matter whether the bank or the government initiated the phone call where the information was disclosed. *Puerta*, 121 F.3d at 1342-1345. The court therefore concludes that as a matter of law, defendant is protected from liability as long as the disclosure was within the limits of

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[14]At oral argument, the court asked counsel for the defendant exactly what was the nature of the "possible violation of statute or regulation" involved with the disclosure allegedly made in this case. Counsel of the defendant stated that at the time the disclosure was made, the bank had before it a "warrant for arrest of article in rem so that the bank was aware that there was a pending forfeiture action in the Eastern District of New York with respect to the funds on account in the name of specified customers, among them the plaintiff before this court, and that among the issues Judge Trager found probable cause is that there were controlled substance violations, money laundering, facilitation offenses under 841, and that the property was subject to seizure and forfeiture under § 981, Title 18, and Title 21 §881." Later, counsel again reiterated that "if one only reads the warrant for arrest, there are violations set forth, federal money laundering laws and property traceable, money furnished or intended to be furnished in exchange for controlled substances in violation of certain provisions of Title 21."

§3403(c).

Under §3403(c), the bank can disclose the name of the person, the account involved, and the nature of the suspected activity. In this case, the bank disclosed the name of plaintiff Maria Villalba. The only other information disclosed by the bank was that Villalba attempted to transfer $500,000 from her frozen account. In this case, it was appropriate to disclose the transaction itself because it was the essence and the source of the possible violation of statute or regulation. See, e.g., *Bailey v. United States Dep't. of Agriculture*, 59 F.3d 141 (10th Cir. 1995) (bank was entitled to immunity under the RFPA for disclosures of the bank's food stamp log, the names of the depositors, and the monetary value of the of the food stamps involved because reporting the withdrawals was revealing only the essence of the suspected illegal activity in this case). Counsel for the plaintiff indicated that it would be acceptable, albeit barely, had the bank said Maria Villalba is attempting to transfer money out of her account. Plaintiffs problem is apparently that the bank also

indicated that the amount of the transfer is $500,000. The court concludes that even if the bank disclosed the $500,000 amount, it is still permissible as a part of the "nature of any suspected illegal activity" under §3403(c). Additionally, plaintiffs have not produced evidence to suggest that the government was allowed to see actual financial records as in *Lopez*. See 129 F.3d at 1191. Accordingly, the court concludes that even if defendant did disclose Villalba's transaction to the government, defendant would be entitled to immunity from liability under 12 U.S.C. §3403(c). Defendant's motion for summary judgment is therefore granted.

WHEREFORE, IT IS ORDERED THAT:

1) Plaintiffs motion for partial summary judgment (DE # 121) is DENIED.

2) Defendant Coutts & Co.'s motion for summary judgment (DE # 93) is GRANTED. Plaintiff shall take nothing in this case.

3) All pending motions, including DE # 134, are

DENIED as MOOT.

4) This case is hereby CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 27 day of March, 2000.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11949
D.C. Docket No. 96-01971-CV-AS

MARIA DEL CARMEN MIRANDA DE VILLALBA,

Plaintiff-Appellant,

versus

COUTTS & CO. (USA) INTERNATIONAL,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 11, 2001)

Before EDMONDSON, FAY and NEWMAN*, Circuit Judges.
NEWMAN, Circuit Judge:

This appeal concerns the scope of the provision of the Right to Financial Privacy Act of 1978 ("RFPA") that insulates a financial institution from liability for certain disclosures to a

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* Honorable Jon 0. Newman, U.S. Circuit Judge for the Second Circuit, sitting by designation.

government authority concerning possible law violations. *See* 12 U.S.C.§3403(c). Maria Villalba appeals from judgment of the District Court for the Southern District of Florida (Alan S. Gold, District Judge), dismissing, on motion for summary judgment, her suit under the RFPA against Defendant-Appellee Coutts & Co. USA. We conclude that the disclosure was permissible under the RFPA and therefore affirm.

Background

Plaintiff-Appellant Maria Villalba resides in Colombia and is a citizen of both Colombia and Spain. She maintains an account with Defendant-Appellee Coutts & Co. USA ("Coutts"), a Florida corporation. Coutts is a subsidiary of National Westminster Bank PLC, and is an "Edge Act corporation," authorized to engage in foreign banking.[1]

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[1] An "Edge Act corporation," is a corporation formed for the purpose of "engaging in international or foreign banking or other international or foreign financial operations.., either directly or through the agency, ownership or control of local institutions in foreign countries." 12 U.S.C. §611.

In May 1996, the United States filed an in rem complaint against $200,000 in accounts at Coutts and other financial institutions. The accounts at Coutts were controlled by Villalba and her relatives. The Government's complaint alleged that the funds in the accounts were obtained from money laundering. The District Court for the Southern District of New York (David G. Trager, District Judge) immediately issued a civil arrest warrant for the funds, and the warrant was faxed to Coutts. The warrant ordered Coutts to "arrest, attach and seize the Property until further order of the Court."

A day or two after these warrants were executed, according to a deposition of the Assistant U.S. Attorney ("AUSA") handling the forfeiture action, "someone" at Coutts told the AUSA that Villalba had unsuccessfully attempted to wire transfer money out of her account at Coutts; the AUSA "believe[d] the number given was $500,000." Coutts denies that this disclosure ever occurred. Moreover, according to Coutts, the only known attempted transfer of seized funds occurred three

days after Coutts received the warrant, when Villalba sought to transfer $75,000. In July 1996, Villalba and several of her relatives filed this civil action in the Southern District of Florida, alleging that Coutts's disclosure of the alleged $500,000 withdrawal attempt violated the RFPA, and other laws. The RFPA prohibits bank employees from disclosing customers' financial information to the governmental authorities without customer authorization, subject to various exceptions. After dismissal of the original complaint and reinstatement following a prior appeal to this Court see *Villalba v. Coutts & Co. (USA)*, 156 F.3d 185 (11th Cir. 1998) (table), the complaint has been narrowed to include only a claim by Villalba against Coutts under the RFPA.

Coutts sought summary judgment on the ground that, even if the alleged disclosure of an attempted $500,000 wire transfer had occurred, it is protected from liability by 12 U.S.C. §3403(c), which provides:

Nothing in this chapter shall preclude any financial

> institution, or any officer, employee or agent of a financial institution, from notifying a Government authority that such institution, or officer, employee, or agent has information which may be relevant to a possible violation of any statute or regulation. Such information may include only the name or other identifying information concerning any individual, corporation, or account involved in and the nature of any suspected illegal activity. . . . Any financial institution, or officer, employee, or agent thereof, making a disclosure of information pursuant to this subsection, shall not be liable to the customer under any [federal or state law].

The District Court agreed and granted summary judgment in favor of Coutts.

Discussion

Villalba contends initially that the District Court erred in permitting the section 3403(c) defense to be asserted for the first time on motion for summary judgment. We disagree. A court may consider an affirmative defense that did not appear in the answer, if the plaintiff has suffered no prejudice from the failure to raise the defense in a timely fashion. See *Hassan v. United States Postal Service*, 842 F.2d 260, 263 (11th Cir. 1988). Coutts's

answer included as an affirmative defense the safe harbor provision of the Annunzio-Wylie Anti-Money Laundering Act, 31 U.S.C. § 5318(g)(3). This provision insulates a financial institution from liability for disclosures "of any possible violation of law or regulation or a disclosure pursuant to this subsection or any other authority." *Id.* Whether or not this provision covers a disclosure pursuant to section 3403(c) (the District Court thought it did not), the two provisions are sufficiently similar that the late assertion of section 3403(c) could not realistically cause prejudice to a plaintiff who was timely alerted to a section 531 8(g)(3) defense.

The initial question on the merits of the section 3403(c) defense is whether there was a factual dispute that Coutts "suspected illegal activity." 31 U.S.C. §3403(c). Villalba contends that since Coutts denied that the disclosure was made, by its "own admission, it never had such a "suspicion" Brief for Appellant at 13. However, a business entity like Coutts is entitled to contend in the alternative that it is unaware of any disclosure made by its

employees, but that if the alleged disclosure was made, the employee making it indisputably had a basis for reasonable suspicion of illegal activity.[2] That basis exists here where a depositor attempts to wire a large amount of funds out of an account that has been frozen by court order because of suspected money-laundering.

The requisite suspicion is not precluded, as Villalba contends, by the fact that Coutts did not file a Suspicious Activity Report ("SAR"), as required by 31 C.F.R. § 103.18(b)(3) (2001). A bank is obliged "immediately [to] notify, by telephone, an appropriate law enforcement authority in addition to filing timely a SAR" *Id.* If the wire transfer attempt was disclosed (which must be assumed for purposes of the summary judgment motion), no reasonable jury could fail to find, on the undisputed

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[2] Villalba contends that the insulation of section 3403(c) is available only where the disclosure is made on the basis of a subjective suspicion of illegal activity; Coutts counters that only objectively reasonable suspicion is required. We need not resolve that dispute because, for purposes of this appeal, we will assume that subjective suspicion is required

circumstances, that the person making the immediate disclosure had a reasonable suspicion of illegal activity, leaving the failure subsequently to file an SAR without sufficient probative force to preclude such a finding. Whether the failure to file the SAR was due to neglect or a mistaken belief that it was not required because the Government was already initiating action is irrelevant to the justification for the alleged disclosure.

The further issue on the merits is whether the extent of the alleged disclosure exceeded the scope of the information section 3403(c) permits to be revealed. Even if we assume, as Villalba contends, that disclosure is limited to the name of the individual and "the nature of any suspected illegal activity," 12 U.S.C. §3403(c) (emphasis added), we agree with the District Court that the alleged mention of the $500,000 amount of the requested wire transfer did not go beyond the "nature" of the suspected activity. What made the request indisputably suspicious was its size, and we would be trifling with the statute if we construed it to permit disclosure of request to transfer "a very large amount," but not "a

$500,000 amount." *See Bailey v. USDA*, 59 F.3d 141, 143 (10th Cir. 1995) (disclosure of withdrawal and deposit records can qualify as information about "nature of the suspected illegal activity," where these amounts are necessary to show grounds for the bank's suspicion). The congressional concern for privacy was sufficiently observed by not revealing any details of the purported recipient of the funds requested to be wired.

Conclusion

The judgment of the District Court is AFFIRMED.